

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.11.2018

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

CRP.(NPD).No.3225 of 2018

and

C.M.P.No.18414 of 2018

K.Sundaramoorthy

..Petitioner

Versus

1.R.Perumal

2.K.Ramesh

..Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair order and decreetal order dated 07.02.2018 passed in E.A.264 of 2016 in E.P.20 of 2015 in O.S.127 of 2014 on the file of the I Additional Subordinate Judge, Cuddalore.

For Petitioner : Mr.R.Gururaj

ORDER

The present Civil Revision Petition is filed, challenging the fair and Decreetal order dated 07.02.2018 passed in E.A.No.264/2016 in E.P.No.20 of 2015 in O.S.No.127/2014 on the file of the I Additional Sub-Ordinate Judge, Cuddalore.

2.Admittedly, the Revision petitioner was not a party to the original suit filed in O.S.No.127/2014. The 1st respondent was the plaintiff in the Civil suit in O.S.No.127/2014 and the suit was filed against the 2nd respondent for specific

performance. The Revision Petitioner herein is the third party in respect of the Civil Suit filed in O.S.No.127/2014. The Suit was decreed ex-parte.

3.The grievance of the Revision Petitioner is that he is running a grocery shop in the suit schedule mentioned property. Thus, he is also having interest over the portion of the property and the Revision petitioner claims title and ownership. However, the grocery shop has not been demarcated in the suit schedule mentioned property and therefore, no action can be taken against the Review petitioner with reference to the ex-parte decree passed in O.S.No.127 of 2014.

4.The Revision Petitioner has already filed an application under Section 47 of the Code of Civil Procedure, to hold that the decree passed in O.S.No.127 of 2014 is null and void and to award cost. The petition filed by the Revision Petitioner under Section 47 of the Code of Civil procedure is pending for adjudication. Under these circumstances, the Interlocutory Application was filed by the Revision petitioner for appointment of an Advocate Commissioner, under Order 26, Rules 8 & 9 of Code of Civil Procedure to inspect the suit property and note down the physical features and file a report for compliance to the Court. The contention in the application filed under Section 47 of the Code of Civil Procedure by the Revision petitioner is that he is the owner of the grocery shop, which falls within the schedule mentioned property in O.S.No.127 of 2014 and is running a grocery shop with electricity connection and paying the charges.

5.The learned I Additional Sub-Ordinate Judge, Cuddalore, rejected the application on the ground that the petition filed for appointment of an Advocate Commissioner is for the purpose of collecting evidences and therefore, the same cannot be considered.

6.The learned counsel for the Revision Petitioner is of an opinion that the Revision Petitioner has to establish his case only through the report to be submitted by the Advocate Commissioner. The Revision Petitioner has set out the facts and details in his application submitted under Section 47 of the Civil Procedure Code. In order to substantiate the contention raised in the application filed under Section 47 of CPC, appointment of an Advocate Commissioner is imminent. Thus, the Revision Petitioner is constrained to move an application under Order 26, Rules 8 & 9 of the Code of Civil Procedure for appointment of an Advocate Commissioner.

7.This Court is of an opinion that it is not a matter of routine in respect of appointment of an Advocate Commissioner, the person, who is approaching the Court, must establish his case at the first instance by producing all the relevant documents and by adducing evidences. The burden of proof lies on the person, who approaches the Court at the first instance. Contrarily, filing an application under Section 47 of the Civil Procedure Code and thereafter, filing an application under Order 26, Rules 8 & 9 for appointment of an Advocate Commissioner to note down the physical features and other details of the property cannot be encouraged by the Courts. The provision must be used only to remove the doubt

in the mind of the Court.

8. The Order 26, Rule 9 of CPC denotes Commissions to make local investigations. "In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court." Thus, it is unambiguous that if there is any doubt arises in the mind of the Court in respect of the demarcation of the portion of the property or otherwise, then alone, the Court can appoint an Advocate Commissioner. It is not as if, the application is to be considered for the purpose of demarcating the property in general. Only on establishing the facts and details by the person, who has approached the Court. If the Court feels that some clarifications or doubts are to be cleared, then alone the Court can appoint an Advocate Commissioner. The Courts cannot appoint an Advocate Commissioner in a routine manner for the purpose of measuring the property or demarcating the metes and bounds. The limitations contemplated are to be followed scrupulously, otherwise there is a possibility of abuse of the provision of appointment of an Advocate Commissioner as contemplated under the Code of Civil Procedure. If such a lenient view is taken, then every party, who is approaching the Court will be tempted to file an application Under Order 26 of CPC, for appointment of an Advocate Commissioner for the purpose of establishing their case. The Advocate Commissioner cannot be appointed for the

purpose of establishing the case of the petitioner. The Advocate Commissioner is to be appointed only to remove the difficulty or to clarify certain doubts, if any arises in the minds of the Court. Thus, it is not the choice or discretion of the person, who is approaching the Court. Court must be of an opinion that there is a genuine doubt and the said doubt is to be cleared only by appointing an Advocate Commissioner and by receiving a report from the Commissioner. This being the principle to be followed, this Court is of an opinion that the learned I Additional Sub-Ordinate Judge, Cuddalore has made a finding that the petitioner has filed the present petition in order to collect evidences for the purpose of establishing his case. This being the finding of the Court, there is no reason to reverse the finding of the learned I Additional Sub-ordinate Judge, Cuddalore in the present revision petition as the reasonings given are certainly candid and convincing.

9.Thus, the Civil Revision Petition is devoid of merits and stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

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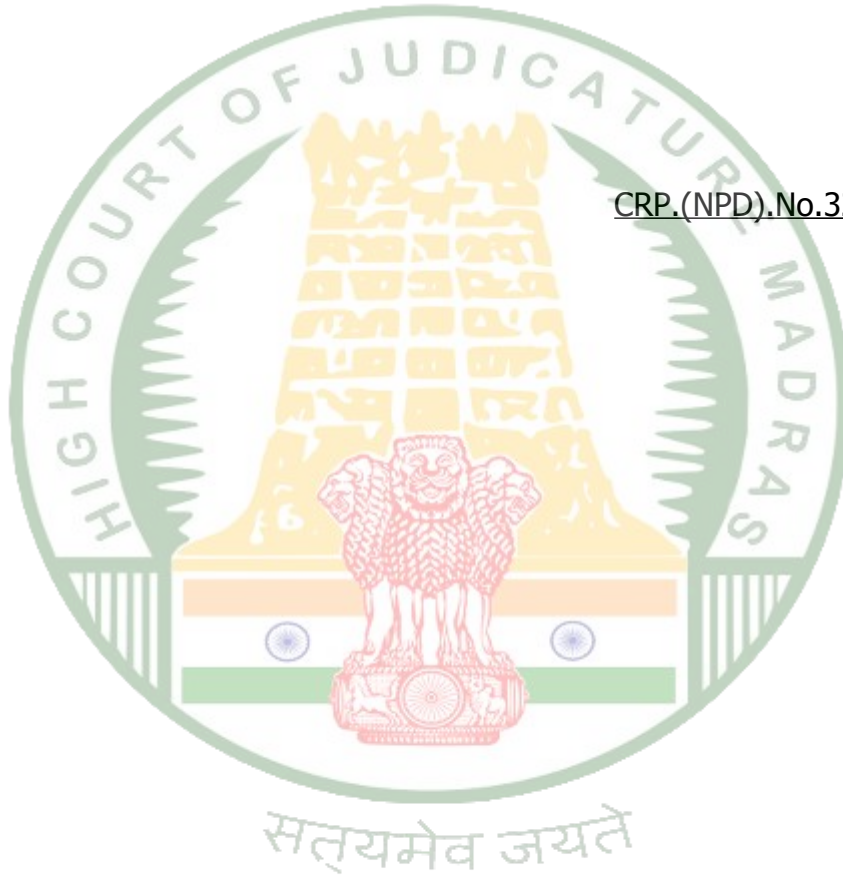
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S.M.SUBRAMANIAM, J.

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To

The learned I Additional Subordinate Judge,
Cuddalore.



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